BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALBERT R. ALVAREZ Claimant	)	
VS.	)	
BOSSLER BROWN & ASSOCIATES Respondent	)	Docket No. 1,012,734
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the May 16, 2005, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on January 10, 2006.

APPEARANCES

George H. Pearson, of Topeka, Kansas, appeared for the claimant. James K. Blickhan, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.[1] During oral argument to the Board, counsel for claimant stated he had no objection to the settlement documents attached to respondent's submission brief to the ALJ. Therefore, the Board will consider those documents to be part of the record.

[1]The parties agreed during oral argument to the Board that the Regular Hearing was held in 2005, not 2004 as shown on the transcript.

ISSUES

The ALJ gave equal deference to the functional impairment ratings of Dr. Phillip Baker (10 percent) and Dr. Peter Bieri (16 percent) and averaged their ratings to find claimant sustained a 13 percent permanent partial impairment to the body as a whole. The ALJ also found that claimant was eligible for work disability in excess of this percentage of functional impairment. Because claimant had made a good faith effort to find employment, his actual post-accident earnings were used to determine wage loss. As claimant remained unemployed, the ALJ also found that claimant had a 100 percent wage loss. The ALJ considered the two task loss percentages assessed by Dr. Baker and the task loss assessment of Dr. Bieri and found that claimant had a task loss of 38 percent which, when averaged with the wage loss, computed to a permanent partial disability of 69 percent. The ALJ also declined to reduce the award by applying a credit for claimant's prior injury, finding that it was unclear what relationship the manual used in computing claimant's previous impairment rating had with the AMA *Guides*[2], that neither Dr. Baker nor Dr. Bieri assessed any portion of their functional impairment ratings to a preexisting impairment, and that the prior impairment was to a different part of claimant's spine.

Respondent and its insurance carrier (respondent) request review of the nature and extent of disability. Respondent argues that claimant should be limited to his functional impairment rating because he failed to make a good faith effort to find employment. Respondent also argues that Dr. Baker's opinion is more credible than that of Dr. Bieri and, therefore, claimant's permanent partial disability award should be limited to Dr. Baker's 10 percent rating. Respondent also argues that if the Board finds claimant is entitled to work disability, a wage of $9 per hour should be imputed as claimant's post-accident wage earning ability based on the opinion of Bud Langston. Respondent also requests the Board use the impairment rating contained in the record of the settlement hearing in claimant's prior workers compensation case and order that respondent be given a credit for such prior disability as an offset against any award entered in this case.

Claimant requests that the ALJ's Award be affirmed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed. The Board agrees with the findings of fact and conclusions of law set forth by the ALJ in the Award and adopts the same as its own findings and conclusions as if specifically set forth herein.

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[2]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Respondent is an agency that places temporary employees with employers as well as a recruiting firm. Claimant began working for respondent in July 2003 and was sent to PTMW, a company that manufactures control boxes for the railroad. He was employed as a painter at the rate of $11 per hour. He customarily worked 40 hours per week. Sometimes he worked more, for which he was paid at time and a half. The ALJ found claimant's average weekly wage to be $468.24, and the parties do not raise that finding as an issue on appeal.

On August 25, 2003, claimant was told to move some metal buildings, and in doing so, he injured his lower back. He reported his injury to his supervisor that same day and was sent to St. Francis Hospital for treatment. He was eventually seen by Dr. Michael Smith. Dr. Smith performed a fusion on claimant's low back on February 5, 2004. After claimant's surgery, he went through three sessions of physical therapy and was released by Dr. Smith as having reached maximum medical improvement on June 24, 2004. He has had no other treatment since that date.

On June 25, 2004, claimant returned to respondent and talked to Dan Jehlik, president and part owner of respondent, about returning to work. Mr. Jehlik told him he would give him a call. When he did not receive a call after two weeks, he called Mr. Jehlik back. Mr. Jehlik told him he did not have any work for him but would keep him in mind and call if something came up. Mr. Jehlik has not called claimant back. Likewise, claimant has not called Mr. Jehlik back but has been seeking other employment. Claimant, however, has not found employment since being released by Dr. Smith. Claimant submitted a notebook containing a list of approximately 150 businesses he contacted concerning employment. By the time of the February 25, 2005, Regular Hearing, claimant testified he had 15 interviews. He also testified that he had not intentionally done anything to sabotage himself from getting hired, nor had he refused any work. At the time of the Regular Hearing, claimant was also attending school full time studying to become a certified medication aide (CMA).

Claimant testified that since the accident with this respondent, he has chronic pain and takes Tylenol and/or Motrin two to three times a week. He also uses a TENS unit three or four times a week. He can no longer run, ride a dirt bike or play football or racquetball. He walks at the mall for exercise.

Dan Jehlik testified that he hired claimant to work 40 hours a week at $11 per hour and placed him at PTMW. Mr. Jehlik testified that after claimant's release from treatment by Dr. Smith, claimant visited with him about his work restrictions. Mr. Jehlik testified that he had jobs within claimant's restrictions, but the question would be whether claimant had the skills to fit those jobs.

Phillip Baker, M.D., is a board certified orthopedic surgeon. He examined claimant at the request of respondent on September 9, 2004. Dr. Baker noted that claimant's treatment first consisted of restricted duty and physical therapy. When claimant was unable to return to work, Dr. Smith ordered a discogram. Based on the results of that test,

Dr. Smith performed a spinal fusion on February 5, 2004. Dr. Baker testified that for a person with back surgery and degenerative disease in the spine, claimant's neurological examination was normal, muscle function was normal, reflexes were normal and sensory was normal. He acknowledged that claimant had a loss of forward flexion, but Dr. Baker testified that when he examined claimant, it was too early to tell if that loss was permanent.

Dr. Baker assigned claimant a 10 percent permanent partial impairment, using the AMA *Guides*. He did not specifically give claimant any restrictions but felt that it would be logical for claimant to have a 50-60 pound weight limit. He stated that claimant had a solid fusion but has degenerative disease. Dr. Baker believed that claimant had a good outcome from his surgery.

Dr. Baker reviewed a task list prepared by Bud Langston, which included 48 tasks. He testified that claimant had lost the ability to perform nine of those tasks, which computes to a 19 percent task loss. Dr. Baker also reviewed a task list prepared by Richard Santner. Of the 53 tasks on Mr. Santner's list, Dr. Baker opined that claimant was unable to perform 20, for a 38 percent task loss.

Peter Bieri, M.D., is an internal medicine physician and a general surgeon. His residency included specialization in ear, nose and throat, head and neck, and plastic surgery. He is also board certified by the American Academy of Disability Evaluating Physicians. He examined claimant at the request of claimant's attorney on October 22, 2004. Claimant reported to him that he used a TENS unit and over-the-counter pain medication. Dr. Bieri noted that claimant's gait, station and posture were unremarkable. Flexion and extension were accompanied by a subjective increase in complaints of pain. Lower extremities were symmetrical and equal in length, there was no tissue atrophy, and deep tendon reflexes were normal. Sensory examination revealed no persistent loss of sensation, and strength was normal. Straight leg raising was positive bilaterally at 90 degrees for localized pain on the right and pain radiating into the left hip. Using the AMA *Guides*, Dr. Bieri opined that claimant had a 12 percent permanent partial impairment for specific disorders of the lumbar spine. In addition, he rated claimant as having a 5 percent whole person impairment for range of motion deficits of the lumbar spine. These combined to a whole person permanent partial impairment of 16 percent. Dr. Bieri believed claimant should have permanent work restrictions to prevent exacerbation or aggravation of his condition. He placed claimant in the light-medium physical demand level, which would limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds for constant lifting.

Dr. Bieri reviewed the task loss list of Mr. Santner. He opined that claimant was no longer able to perform 29 of the 53 tasks, for a 55 percent task loss.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[3]

And functional impairment is defined by K.S.A. 44-510e, as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides,* if the condition is addressed by those Guides. The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment. Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction.[4] In this case, respondent simply relied upon a previous settlement agreement without establishing the percentage of preexisting impairment, if any, pursuant to the 4th edition of the AMA *Guides*. As a result, respondent failed to prove the extent of claimant's preexisting functional impairment, if any.[5]

In 1985, claimant injured his low back while restraining a resident when he worked at the Kansas Neurological Institute (KNI). He was treated by an orthopedic physician and released; he had no surgery for that injury. Claimant did not remember having any restrictions after his release from treatment for that injury. Claimant's workers compensation case with KNI was settled, with claimant receiving a settlement amount based on a 20 percent permanent partial disability to the body as a whole plus an amount for future medical.

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[3]K.S.A. 44-501(c).

[4]*See Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2001); *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 2, 2001).

[5]See *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Neither Dr. Baker nor Dr. Bieri assessed any portion of their ratings to claimant's preexisting impairment from his 1985 injury. Dr. Baker was asked no questions concerning claimant's 1985 injury, and Dr. Bieri stated only that he reviewed an evaluation by Dr. Edward Prostic that referenced an injury to claimant's low back in the 1980s with eventual resolution of symptoms. Dr. Bieri's report states, under the section marked Past History, that "claimant may have experienced some type of minor back injury in 1986, treated conservatively, with no impairment or disability."[6] Respondent has failed to prove an entitlement to a credit under K.S.A. 44-501(c) for a preexisting impairment.

Permanent partial disability under K.S.A. 44-410(a) is defined as the average of the claimant's work tasks loss and wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.[7]

Dick Santner saw claimant at the request of claimant's attorney on July 20, 2004. He identified 53 tasks performed by claimant in the 15 years before his injury. He did not ask claimant about his job-search efforts and did not address claimant's post-accident wage earning ability.

Bud Langston was asked by respondent's attorney to do a vocational evaluation of claimant. Mr. Langston interviewed claimant on January 26 and January 28, 2005. He identified 48 tasks claimant performed in the 15 years before his injury.

Mr. Langston said that claimant reported he has looked at a number of different jobs, most in the fields that he has performed in the past. He stated that there were other positions within claimant's restrictions, but claimant probably would not be a good candidate for hire in those because of lack of experience. Mr. Langston indicated that claimant was going to school for and had just passed his certification test as a CMA. Mr. Langston said claimant was going to provide him with a list of occupations and employers he had talked with but had not done so. He, therefore, had no opinion concerning claimant's job search efforts. Mr. Langston opined that with Dr. Bieri's restrictions and claimant's background, he should be employable at $8 to $9 per hour and work a 40-hour week.

Based primarily upon claimant's testimony, together with his list of job contacts and interviews, and considering his injury, restrictions, education and experience, the Board

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[6]Bieri Depo., Ex. 2.

[7] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

finds that claimant has demonstrated a good faith effort to find appropriate employment. Nevertheless, now that he is a CMA, he could reasonably be expected to focus his job search to appropriate areas of employment and likewise expand the number of contacts he makes per week with prospective employers. Claimant's testimony, coupled with his list of the job contacts he has made, establishes a good faith effort. But, it appears that claimant could have and perhaps would still benefit from professional job placement assistance.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 5, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2006.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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Claimant	)	
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VS.	)	
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BOSSLER BROWN & ASSOCIATES	)	
Respondent	)	Docket No. 1,012,734
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER NUNC PRO TUNC

The Board has been made aware of an error in its Order entered in this case on January 18, 2006, in the first sentence of the second full paragraph on page 6. That sentence is corrected to read:

> Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work tasks loss and wage loss.

All other statements, findings and conclusions in the Board's Order shall remain as originally stated.

IT IS SO ORDERED.

Dated this _____ day of March, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director